Supreme Court, U.S.
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No. 01-1469

IN THE

Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
AND
UNITED STATES BEET SUGAR ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT UNITED STATES BEET SUGAR ASSOCIATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Customs Service's determination that the substance imported by petitioner was subject to subheading 1702.90.10/20 of the Harmonized Tariff Schedule of the United States, on the ground that a temporary additive to the substance constituted a "foreign substance" under the subheading.

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v.

UNITED STATES OF AMERICA
AND
UNITED STATES BEET SUGAR ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT UNITED STATES BEET SUGAR ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 264 F.3d 1126. The opinions of the Court of International Trade (Pet. App. 24a-62a, 63a-71a) are reported at 74 F. Supp. 2d 1324 and 86 F. Supp. 2d 1339, respectively. The Customs Service ruling letter upheld by the court of appeals is reported at 33 Cust. B. & Dec. No. 35/36, at 41-47 (Aug. 25, 1999), and is reproduced *infra* at App. 1a-27a.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2001. Pet. App. 1a. The petition for rehearing and rehearing en banc was denied on December 4, 2001. *Id.* at 22a-23a. On February 25, 2002, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 3, 2002. The petition for a writ of certiorari was filed on April 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Under the Harmonized Tariff Schedule of the United States ("HTSUS"), the volume of sugar imports is controlled by a Tariff Rate Quota ("TRQ"). The TRQ is administered by the Secretary of Agriculture, who sets the level of the quota. *See* HTSUS Ch. 17, Additional U.S. Notes 5.

With a few narrow exceptions, the TRQ applies to all imports of raw and refined sugar. One narrow exception is based on the amount of soluble non-sugar solids contained in the syrup. Specifically, HTSUS subheading 1702.90.10/20 subjects to the TRQ all sugar syrups "derived from sugar cane or sugar beets" and "[c]ontaining soluble non-sugar solids (excluding any foreign substances . . . added or developed in the product) equal to 6 percent or less by weight of the total soluble solids." In contrast, sugar syrups containing a higher percentage by weight of non-sugar solids are subject to HTSUS subheading 1702.90.40, which provides a much lower tariff rate for molasses and other products that do not compete directly with sugar. Pet. App. 3a

2. In the mid-1990s, petitioner Heartland By-Products, Inc. concocted a scheme to import sugar syrup into the United States while avoiding the TRQ applicable to imports of raw sugar and sugar syrups. Its plan was to take a product otherwise classified under subheading 1702.90.10/20 and thus subject to the TRQ and mask it so that it resembled in

form a syrup classified under HTSUS subheading 1702.90.40. Pet. App. 3a-4a.

Petitioner's strategy was to reverse a portion of the sugar manufacturing process. The production of crystalline raw cane or beet sugar generally requires a manufacturer first to crush cane stalks or to slice and boil sugar beets to produce raw sugar juice, and then to separate the raw sugar from the remaining syrup through a series of vacuum pan crystallizations and centrifugal separations. C.A. App. 1097.[1] The extracted sucrose, known as raw sugar, is in crystalline form surrounded by a thin film of molasses. *Id.* The liquid that remains after the final centrifugal separation is known as "final molasses," or blackstrap molasses. No further sugar can be obtained from it and it is not edible for human consumption. *Id.*

Although the entire sugar manufacturing process involves separating the sugar from the molasses, App. 7a-8a, petitioner's Canadian affiliate would do the opposite. After deriving crystalline raw sugar by *separating* it from molasses as described above, it would *add* blackstrap molasses and water to the sugar prior to importation. Pet. App. 6a-7a; App. 2a, 7a. That process yielded a solution appearing to contain soluble solids of which slightly more than 6% were non-sugar solids, thus bringing it within subheading 1702.90.40. After importation, however, petitioner would simply re-remove the molasses, leaving a syrup containing virtually pure sucrose. This sugar was then sold in competition with domestic sugar syrups and other products imported under the TRQ. App. 7a-9a; C.A. App. 252-57. Petitioner would return the removed molasses to Canada where the scheme was repeated by adding the molasses to more sugar syrup destined for the United States. Pet. App. 19a.

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[1] Citations to "C.A. App." are to the appendix filed with the court of appeals below.

3. As part of this scheme, in 1995 petitioner applied to the local Customs Service ("Customs") office for an advance tariff classification ruling that its mixture was properly classified under HTSUS subheading 1702.90.40. *Id.* at 3a-4a. In its request, petitioner described the mixture merely as a "sugar syrup . . . composed of approximately 6.5% but not equal to or less than 6.0% of soluble non-sugar solids of cane and/or beet origin." *Id.* at 4a. The only other information petitioner provided was that in the process of production, "[g]ranular raw sugar would be combined with molasses . . . to produce a brown sugar of approximately 93 percent polarity," which would "then be dissolved in hot water." *Id.* Petitioner did not describe the purpose of adding the molasses or the fact that the molasses was re-removed immediately after entry into the United States. Based on this limited information, the Customs Area Director issued an advance ruling that classified petitioner's syrup under subheading 1702.90.40. *Id.* at 4a-5a.

The effects of the imported syrup on the domestic sugar industry were immediate and pronounced. Customs observed that "two Louisiana sugar refiners claim[ed] to have lost sales of 25,000 tons of sugar per year as a result of [petitioner's] importations," and that petitioner's imports led the Department of Agriculture to decrease the volume of sugar that could permissibly be imported each year under the low TRQ. App. 9a.

In January 1998, the United States Beet Sugar Association and the United States Cane Sugar Refiners' Association responded by asking Customs Headquarters to reclassify petitioner's import. Pet. App. 5a. Customs then began an extensive investigation into whether there was any commercial reason for adding the molasses to the sugar and whether the syrup in its imported state had any commercial use without removal of the molasses. App. 3a. That investigation uncovered the whole story regarding the process by which petitioner recombined molasses with raw sugar for importation

purposes, details that petitioner had failed to disclose to Customs when it requested the advance classification ruling and that Customs ultimately deemed "essential" to determining the proper classification of petitioner's syrup. *Id.* at 14a.[2]

After almost two years of proceedings during which it gave petitioner ample opportunity to respond to its questions, Customs determined that petitioner's syrup should be classified under subheading 1702.90.10/20. In a lengthy published Headquarters Ruling Letter, Customs provided a detailed factual and legal analysis of the syrup and its proper classification under the tariff laws. *Id.* at 1a-27a. Customs concluded that petitioner's mixture had no commercial identity or use in its condition as imported. *Id.* at 7a, 16a. Moreover, Customs found,

> [I]t makes no financial sense, absent a desire to avoid the sugar tariff, for a conventional sugar operation to either enrich a liquid (syrup or molasses) stream with sugar or to add molasses to such a stream. Sugar operations separate sugar from the liquid or molasses phase, they do not separate the

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[2] In addition to the expert views of Customs' scientists and chemists, the evidence received by Customs included evidence from sugar industry representatives that petitioner's product was not "commercially viable" (C.A. App. 143) and had no use other than avoiding the TRQ, and that none of their member companies had ever made such a product in the United States, had ever been asked to make such a product, had ever sold such a product, or was aware of any other company that did so beside petitioner (C.A. App. 149-50); comments from Florida Crystals, the Domino Sugar Corporation, the International Sugar Policy Coordinating Commission of the Dominican Republic, and other industry participants that petitioner's fabrication of its import could have no conceivable purpose and would make no financial sense absent a motive of tariff evasion (C.A. App. 411, 424, 437, 448); and extensive evidence from members of the domestic sugar industry of the harm that petitioner's operation had already caused to the United States' sugar program (*see, e.g.*, C.A. App. 435-38).

> sugar and then introduce molasses to the sugar, effectively nullifying the refining operation.

Id. at 8a. This anomalous process of pre-importation addition and post-importation extraction of molasses, Customs concluded, was an artifice created solely for the purpose of avoiding the TRQ. *Id.* at 7a, 16a.

Customs also found that the molasses added to the syrup was a "foreign substance" within the meaning of subheading 1702.90.10/20. *Id.* at 25a. Customs observed that "molasses is derived as a by-product from the refining of sugar cane or sugar beets and it is not derived as sugar from the refining of sugar cane or sugar beets." *Id.* Accordingly, Customs found that to introduce such a substance with all its impurities into a syrup containing raw sugar that had already been separated from molasses was to introduce a "foreign substance" into the syrup. *Id.* Thus, the weight of the re-introduced molasses in the syrup was properly excluded when determining whether the syrup exceeds the 6% threshold necessary to escape classification under subheading 1702.90.10/20. *Id.*

Finally, Customs concluded that permitting petitioner's syrup to evade the TRQ would circumvent Congress' clear intent that all products competing with domestic sugar be subject to the TRQ. *Id.* at 8a-9a.

4. Petitioner challenged Customs' ruling in the Court of International Trade ("CIT").[3] Pet. App. 24a. Approximately three weeks before the Customs ruling was to take effect, the CIT announced that Customs' decision was arbitrary and capricious, and that it would grant judgment for petitioner. *Id.* at 24a-62a. When the Association pointed out in its motion for reconsideration that the CIT failed even to consider the entire administrative record as a whole, *id.* at 64a, the CIT

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[3] Petitioner's suit was against both the United States and the United States Beet Sugar Association, which intervened as a defendant. Pet. App. 29a.

stated that it did not need to do so because the case did "not involve a dispute over the facts, but over the law applied to them," *id.* at 67a.

Respondents appealed to the Court of Appeals for the Federal Circuit, which reversed the CIT's judgment. *Id.* at 1a-21a. Applying this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the court held that Customs' ruling was "entitled to deference because of its persuasiveness." Pet. App. 14a. Specifically, the court observed that Customs' ruling was "issued pursuant to a notice and comment process, during which numerous members of the sugar industry . . . submitted comments in support of and in opposition to the ruling." *Id.* at 15a. Observing that Customs' ruling responded to the principal issues raised in the comments it received from the various interested parties, the court concluded that "Customs gave thorough consideration to the ruling" and that the "ruling is supported by a logical and well-reasoned explanation published in the Customs Bulletin." *Id.*

The court's decision to defer to Customs' ruling focused in particular on the finding that the molasses petitioner reintroduced into its syrup for import purposes was a "foreign substance" under HTSUS subheading 1702.90.10/20. The court observed that because "the relevant provision of the HTSUS does not indicate to what a substance must be 'foreign' in order to be a 'foreign substance' excluded from the solids content calculation of 1702.90.10/20," Customs was required to "interpret the term 'foreign substances' in order to classify Heartland's sugar syrup." *Id.* at 16a. Reviewing that interpretation deferentially as required by *Mead* and *Skidmore*, the court concluded that "[t]he fact that molasses and raw sugar both are derived from sugar cane or sugar beets does not undermine Customs' interpretation" that "the molasses [petitioner] adds to raw sugar to make its sugar syrup is a foreign substance." *Id.* As the court explained, "[w]hen the purification of a raw product results in the pro-

duction of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance." *Id.* at 17a. Thus, the court held that the CIT erred in concluding that a substance derived from sugar cane or sugar beets can never be a foreign substance under subheading 1702.90.10/20. *Id.*

Judge Friedman concurred. *Id.* at 18a-21a. He concluded that because "the addition and removal of the molasses from the sugar served no manufacturing or commercial purpose, the conclusion is irresistible that the only purpose of this strange arrangement was to create a fictitious product that, because of the temporary presence of the molasses, qualified for the lower rate of duty on sugar imports containing specified amount of non-sugar solids." *Id.* at 19a. Judge Friedman agreed with Customs that granting petitioner the benefit of a lower tariff rate based on its fictitious product would violate this Court's well recognized rule that an importer may not evade the "prescribed rate of duty [for its product] by resort to disguise or artifice." *Id.* (quoting *United States v. Citroen*, 223 U.S. 407, 414-15 (1912)). Judge Friedman concluded that the record fully supported Customs' finding that "the processing in this case is not legitimate tariff engineering" but merely an effort to engage in "disguise or artifice intended to escape a higher rate of duty," *id.* at 19a-20a (internal quotations and citation omitted), and that Customs was "fully justified in revoking the [advance classification] [r]uling [l]etter that applied the lower tariff rate based upon such 'disguise or artifice,'" *id.* at 21a.

REASONS FOR DENYING THE WRIT

The narrow precedent established by the court of appeals' decision in this case is that Customs permissibly exercised its revocation authority to treat the molasses in petitioner's import as a "foreign substance" under HTSUS subheading 1702.90.10/20, where petitioner had sought to avoid the proper tariff classification by seeking to secure an advan-

tageous advance ruling on the basis of incomplete information, and where a subsequent and thorough investigation revealed that the omitted information was critical to determining the correct classification. That decision is consistent with this Court's precedents, is correct, and will have no untoward consequences.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

A. The Decision Below Is a Routine Application of This Court's Decisions in *Mead* and *Skidmore*.

1. The court of appeals' decision is a straightforward application of this Court's holding in *Mead* to the facts of this case. *Mead* held that *Skidmore* governs the extent to which Customs classification rulings are entitled to judicial deference. Quoting *Mead*, the court of appeals explained that the deference owed to a classification ruling depends on "its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." Pet. App. 14a (quoting *Mead*, 533 U.S. at 235); *see also id.* (quoting *Skidmore*, 323 U.S. at 140, to the same effect).

The court of appeals made no new law of any significance in applying *Mead* and *Skidmore* to the particular facts of this case. Instead, it simply applied the criteria identified in *Mead* and *Skidmore* and concluded that Customs' revocation ruling is entitled to deference. *Id.* at 14a-15a. In so doing, the court noted Customs' "specialized experience" in the classification of goods, *id.* at 15a (quoting *Mead*, 533 U.S. at 234), and stressed that Customs applied its special expertise in this case only after "a notice and comment process, during which numerous members of the sugar industry . . . submitted comments in support of and in opposition to the ruling," *id.*; *see Mead*, 533 U.S. at 234 (observing that *Skidmore* deference may be appropriate in light of the "broader investigations and information available to the

agency") (internal quotations and citation omitted). Customs' ultimate ruling, the court found, was responsive to the principal issues raised in the comments it received, and was "supported by a logical and well-reasoned explanation published in the Customs Bulletin." Pet. App. 15a.

In the absence of any textual definition of the phrase "foreign substance" as it is used in HTSUS subheading 1702.90.10/20, the court of appeals found that Customs' considered application of the term to the instant case was entitled to deference. Specifically, the court held that "[w]hen the purification of a raw product results in the production of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance." *Id.* at 17a. Accordingly, the court held that it was reasonable for Customs to have concluded that the molasses petitioner added to its raw sugar syrup for importation purposes constituted a "foreign substance" under subheading 1702.90.10/20.

Petitioner identifies no case construing subheading 1702.90.10/20 with which this conclusion is even arguably in tension, for no such case exists. In the absence of any contrary precedent on point, the court's decision to credit Customs' well-reasoned, considered decision was simply a routine and fact-bound application of the principles outlined in *Mead* and *Skidmore* to a different section of the tariff schedule.

2. Similarly, review by this Court of another *Mead/Skidmore* tariff case is simply unwarranted at this time. As this Court is undoubtedly aware, *Mead* was decided only last year and settled with finality the issue of "whether a tariff classification ruling by the United States Customs Service deserves judicial deference." *Mead*, 533 U.S. at 221. This Court in *Mead* resolved that question of law in the affirmative. *Id.* at 235. Respondent respectfully submits that scarce judicial resources would be poorly spent were this Court to

take another case to reaffirm a limited and straightforward holding of such recent vintage.

B. The Decision Below Is Consistent With This Court's Tariff Classification Precedents.

Petitioner's claim (Pet. 10) that the decision below "depart[s] . . . from the principles of classification law mandated by the decisions of this Court" is inaccurate, and is a product of petitioner's own mischaracterization of those guiding principles.

1. Petitioner relies almost exclusively on two default interpretive rules: that Congress is generally presumed to prefer that goods be classified based on their condition as imported, *id.* at 11-17, and that importers may generally fashion their goods to secure the lowest duty, *id.* at 18-25. But as this Court has long emphasized, those two default presumptions are constrained by a third, limiting rule that an importer may not "escape[]" "a prescribed rate of duty . . by resort to disguise or artifice." *Citroen*, 223 U.S. at 415; *see also Falk v. Robertson*, 137 U.S. 225, 232 (1890); *Merritt v. Welsh*, 104 U.S. 694, 704 (1881) ("So long as no deception is practised," tariff classification is based on condition of goods when they are imported); *United States v. Hannevig*, 10 Ct. Cust. 124, 128 (1920) ("[T]he law is well settled that in the absence of deception, disguise, or artifice resorted to for the purpose of perpetrating a fraud upon the revenue, imported merchandise must be classified with reference to its condition when imported."); *Savannah Sugar Ref. Corp. v. United States*, 20 C.C.P.A. 272, 277 (1932); *United States v. Breed*, 24 F. Cas. 1222, 1224 (C.C.D. Mass. 1832) (No. 14,638) (Story, J.) ("[A] mere change of form will not authorize a party to evade a law, or escape from its priorities.").

The precedents of this Court and the lower courts applying this rule uniformly teach that while an entity may import a product at any stage of its manufacture so as to achieve a

favorable tariff rate, and may even modify a finished product in a way that achieves a favorable tariff classification, it may not evade an otherwise-applicable tariff by resorting to artifice or disguise.[4] The Court made this point clear in *Merritt*, which petitioner unsuccessfully attempts to rely upon in support of its argument. *See* Pet. 18-25. In *Merritt*, the Court

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[4] *Compare Citroen*, 223 U.S. at 407 (drilled pearls that have not yet been strung, a raw material with a clear commercial identity and use, entitled to receive favorable tariff classification specifically provided for by Congress and applicable to pearls that are not "strung or set"); *United States v. Schoverling*, 146 U.S. 76, 79-82 (1892) (gun stocks and gun barrels, both products known to commerce in a normal stage of manufacture, classified in condition as imported despite importer's intent to assemble them into shotguns, to which a higher tariff applied, after importation); *Seeberger v. Farwell*, 139 U.S. 608, 611 (1891) (finished dress goods ready for immediate sale allowed lower duty for blended fabrics because importers had woven cotton thread into wool fabric); *with, e.g.*, *Savannah Sugar Ref. Corp.*, 20 C.C.P.A. at 277-78 (importer not permitted to avoid tariff applicable to raw sugar by mixing sugar with formaldehyde because "[n]o such article was known in trade or commerce" and "it was not prepared or made up . . . in its imported state . . . as an article utilizable for any purpose except to be refined,"; it thus "was not intended [to] enter the general commerce of the country in the state in which it was imported"; and its only purpose was "experiment[ing] with the tariff law applicable to raw sugar rather than with the product itself"); *Aetna Explosives Co. v. United States*, 9 Ct. Cust. 298, 302-03 (1919) (import of nitric acid mixed with sulphuric acid to prevent it from exploding not entitled to lower duty applicable to "chemical mixture" because no commercial advantage was gained by mixing nitric acid with sulphuric acid in this manner, and mixture "was susceptible of no use other than as nitric acid, which must before use be again treated"), *aff'd*, 256 U.S. 402 (1921); *Fries Bros. v. United States*, 4 Treas. Dec. 850, 851-52 (1901) (importers not permitted to avoid tariff applicable to vanillin by mixing manufactured vanillin with benzyl-chloride because "the article imported is vanillin, . . . to which has been added a foreign ingredient, after its completion, . . . to . . . disguise and mask the article," and while "merchants have a right to so manufacture their merchandise that it may escape the higher rates of duty . . . , this must be done during the process of manufacture, and as part of it, not by a separate operation upon a completed article which is specially provided for in the law") (citing *Merritt*, 104 U.S. 694).

was unanimously of the view that, had the manufacturer there added coloring back to a finished product that had already been processed to remove the color solely to avoid the tariff laws, it would not have been entitled to the benefit of its evasiveness. *See* 104 U.S. at 704-05 ("[I]f after the sugars are manufactured, . . . coloring matter is artificially imposed, . . . [t]he sugars would then have a different color from that which belonged to them when manufactured," and "[t]his might be held to be a fraud on the revenue."); *id.* at 705-06 (Matthews, J., dissenting) (duty should be assessed according to sugar's natural color "if, during the process of manufacture, . . . color is artificially produced by foreign matter, not necessary to the production of the sugar, and introduced for the express purpose of counterfeiting a color of a lower grade, in order to evade the law and escape the duties imposed").

That is, in effect, exactly what petitioner did in this case. As Customs found, "[s]ituations in which there are no commercial purposes for a process, such as the addition and then the removal of molasses from sugar to avoid classification in a tariff provision subject to quota, cross the line of permissible fashioning to one of artifice to obtain favorable tariff treatment by the avoidance of a tariff rate quota." App. 18a. Customs' determination not to permit petitioner to enjoy the benefit of this deception is consistent with—indeed, compelled by—the longstanding rule against "disguise or artifice," and the court of appeals' decision upholding Customs' ruling thus fits comfortably within this Court's tariff classification precedents.[5]

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[5] Petitioner's attempt (Pet. 24) to read Customs' "disguise or artifice" finding out of the record of this case reflects a misunderstanding of the nature of judicial review of agency action. Although the CIT disagreed with Customs' finding on this point, the court of appeals is not bound by the CIT's assessment of the administrative record. Rather, "[i]n reviewing a decision of the Court of International Trade, [the Federal Circuit] applies anew the statutory standard of review applied by that court to the

2. Moreover, Customs' attention to the possible commercial uses of petitioner's syrup in its imported form was an application of a routine method of determining the identity of a manufactured product. In *Mead*, for example, the Court observed that Customs had adopted a definition of "diary" as used in the HTSUS that "reflect[ed] commercial usage and hence the commercial identity of these items in the marketplace." 533 U.S. at 225 (internal quotations and citation omitted); *see also, e.g.*, *Worthington v. Robbins*, 139 U.S. 337, 338 (1881) (finding that white enamel, which had been imported in a partially manufactured state and which could be used for various purposes after further manufacturing processes were applied, was not classifiable as watch material because it could not so be used without further refinement); *Robert G. Lynch Co. v. United States*, 49 C.C.P.A. 74, 76 (1962) (examining potential uses of imported raw sugar to determine its proper classification under Tariff Act provisions mirroring the HTSUS provisions at issue here); *see also* cases cited *supra* note 4. Thus, examination of an import's commercial identify and its potential end uses is a recognized part of the tariff classification process.

The point here is not that Customs may always tax an import according to the form it will ultimately take in the *future* after additional steps in the manufacturing process. As petitioner notes, *see* Pet. 12 n.3, in the absence of a use provision in the relevant HTSUS subheading Customs generally does not impose tariffs based on the ultimate form an import will take when put to commercial use. Rather, the point here is that in determining whether the *present* form of an import is the product of "disguise or artifice," Customs may inquire

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agency's decision." *Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999); *see* Pet. App. 10a (citing *Inland Steel*); *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir.1992). Accordingly, the CIT's decision in no way displaced the factual findings made by Customs, and it was on the basis of those findings that the court of appeals upheld the revocation ruling at issue.

into the extent, if any, of the import's potential uses in its current form. *Cf. Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 905 (Fed. Cir. 1999) ("Classification is an exercise in assessing the commercial status of particular goods . . . .").[6] That is exactly what the Supreme Court itself did in *Worthington*, when it found that enamel could not be classified as watch material because it could be used for various purposes in its current form. *See* 139 U.S. at 338.

Customs followed that approach here. It asked whether there were any potential uses for raw sugar after the molasses was added and determined after exhaustive investigation that there were no uses without removing the molasses from the sugar. That fact, Customs reasoned, supported the conclusion that there was no reason for the syrup to contain the molasses in the first place except as a disguise. *See* App. 16a. The Panel rightly refused to question this approach, which longstanding classification law supports.

3. In addition to coloring the application of the two principles asserted by the petitioner, the "disguise or artifice" doctrine provides an alternative basis for upholding the judgment of the Court of Appeals, and thus the validity of the revocation ruling. It is therefore a significant vehicle problem that counsels against review of this case. Customs, as noted *supra*, p. 6, expressly based its revocation ruling on the principle that petitioner's anomalous pre-importation addition and post-importation extraction of molasses was nothing more than an artifice designed solely to circumvent the TRQ. *See also* App. 7a, 16a. This conclusion was reaffirmed in the

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[6] This Court's tariff classification precedents are also entirely consistent with Customs' partial reliance, in determining that the molasses is a "foreign substance," on the fact that petitioner extracted the molasses from the syrup after importation. Indeed, nothing in this Court's cases suggests that Customs may not compare the current composition of a product to its post- (or pre-) importation composition to determine whether it contains any "foreign substances" for purposes of HTSUS subheading 1702.90.10/20.

court of appeals by Judge Friedman in his concurring opinion, which agreed that "the only purpose" of petitioner's "strange arrangement was to create a fictitious product that, because of the temporary presence of the molasses, qualified for the lower rate of duty on sugar imports containing specified amounts of non-sugar solids." Pet. App. 19a. Judge Friedman further concluded that "[t]he record supports Customs' . . . factual statements, and they fully justify its legal conclusion that [petitioner's] importation of the sugar syrup with molasses is merely 'disguise or artifice' intended to escape a higher rate of duty such as a quota tariff rate. Customs, therefore, was fully justified in revoking the New York Ruling Letter that applied the lower tariff rate based upon such 'disguise or artifice.'" *Id.* at 21a (internal quotations omitted).[7]

Judge Friedman's persuasive application of the facts of this case to the "artifice or disguise" doctrine thus provides not only an alternate and independent basis for upholding the judgment of Customs and of the court of appeals, but also represents a significant vehicle problem that further counsels against review.

II. THE DECISION BELOW IS CORRECT.

Petitioner's true complaint is thus with the court of appeals'—and, at bottom, with Customs'—weighing of the voluminous record evidence in this case. Fact-intensive error-correction of this nature is not, of course, an appropriate basis for *certiorari*. S. Ct. R. 10. In any event, the court of appeals was correct to defer in this case to Customs' final revocation ruling, in light of the overwhelming record evidence

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[7] Petitioner quibbles in a lengthy footnote with a few vague "factual and legal errors" in the concurring opinion of Judge Friedman. *Id.* at 24-25 n.8. Such attempts only underscore the fact-intensive nature of this case that makes it a particularly poor candidate for review on writ of *certiorari*.

from industry specialists and from Customs' and petitioner's *own* experts that petitioner's syrup had no commercial identity.

Customs' conclusion that molasses is a foreign substance within the meaning of Subheading 1702.90.10/20 was a logical, well-reasoned, and straightforward application of the plain terms of that provision. As the court of appeals noted, "the relevant provision of the HTSUS does not indicate to what a substance must be 'foreign' in order to be a 'foreign substance' excluded from the solids content calculation of [subheading] 1702.90.10/20 HTSUS. Customs therefore had to interpret the term 'foreign substances' in order to classify [petitioner's] sugar syrup." Pet. App. 16a. The definition of "foreign" is anything "introduced from outside" or "not belonging to the place in which it is found." 6 *Oxford Dictionary of the English Language* 51 (2d ed. 1989, 1998 reprint). In interpreting the foreign substance provision, Customs sensibly applied this common understanding and concluded that the molasses, which had previously been removed from the sugar in a costly process only to be reinserted for the sole purpose of avoiding the TRQ and then removed again before the sugar could be put to commercial use, did "not belong[] to the place in which it [was] found" at the time of importation.

Customs' determination in the revocation ruling was the product of a long, exhaustive, and fair administrative process. Unlike the advance ruling, the revocation ruling followed an extensive investigation that included, as the court of appeals observed, a lengthy notice and comment period. Pet. App. 6a-7a. Customs received hundreds of pages of evidence from numerous interested parties and scientific and technical sources over the course of that investigation. Most tellingly, the record revealed petitioner's own repeated refusal, in response to repeated requests and opportunities provided by Customs, to explain any purpose for adding the molasses to the sugar other than tariff evasion, or a commercial use for

the import without re-extracting the molasses. *See, e.g.*, C.A. App. 152, 156-93, 195-97, 241-43, 245, 253-58, 295-96. Petitioner consistently failed to provide Customs with any evidence that the addition of the molasses had any commercial purpose other than camouflage. Petitioner's silence on the critical question whether its import had any use without the removal of the molasses was powerful confirmation that the molasses' sole purpose was as an artificial mask.

In the face of its inability to articulate any legitimate commercial purpose for the temporary addition of the molasses, petitioner ultimately resorts to attacking the ruling as the result of untoward political pressure. Pet. 5-6. Little need be said in response to this claim other than that it has never been accepted by any court to which it has been presented. As the record makes clear, it is hard to see how Customs' investigation could have been more thorough or exhaustive, or how its decision-making process could have been more reasoned or well-considered. At every stage of the revocation process, Customs addressed with detailed and persuasive analyses the various objections, both factual and legal, that could be raised to classification under subheading 1702.90.10/20. *See, e.g.*, C.A. App. 232, 241, 245, 869-71, 887, 889-92. That respondent and other interested parties may have communicated their views to Customs does not render the proceedings unfair or less well-reasoned. Moreover, that some of those parties may have been interested Senators or other elected representatives does not alter this analysis. It is quite clear that all parties with an interest may communicate their views to Customs at any time without rendering a proceeding the product of an illicit "political" consideration. *See Ammex, Inc. v. United States*, 62 F. Supp. 2d 1148, 1167-68 & n.16 (Ct. Int'l Trade 1999); *Way Distribs., Inc. v. United States*, 653 F.2d 467, 471 (C.C.P.A. 1981). Indeed, petitioner itself repeatedly attempted to influence Customs' decision through its own elected representatives. *See* C.A. App. 238-39; 277-85; 300-07; 347-50; 455-56. Petitioner makes no allegations of bribery, fraud, or any other sort of illicit breakdown in the

proceedings that might legitimately call Customs' decision into question.

III. THE COURT OF APPEALS' DECISION WILL HAVE NO UNTOWARD CONSEQUENCES.

Contrary to petitioner's hyperbolic claim (Pet. 25) that the court of appeals' decision will "cripple the trade community's ability to plan international commercial transactions," the decision below creates no conflict with prevailing precedent and will have few repercussions beyond its immediate impact on this case.

Other than repeating its claim that the decision below is at odds with selected principles of tariff classification—a claim that, as described above, simply ignores both the language of the specific subheading and the cardinal rule that an importer may not use "disguise or artifice" to obtain a favorable tariff classification—petitioner's principal complaint seems to be that Customs did not adhere to the advance classification ruling issued by its New York office. *See* Pet. 26 n.9. But as the court of appeals correctly observed, *see* Pet. App. 16a, Customs Headquarters possesses clear statutory authority under 19 U.S.C. § 1625(c) to engage in independent review of any tariff classification and to revoke or modify any advance classification ruling on the simple grounds that it is in error or, if not in error, no longer is in accordance with the views of the Customs Service.[8] Indeed, federal regulations make clear that although local Customs offices have

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[8] Moreover, the fact that Customs revoked its advance classification ruling does not by itself preclude judicial deference to the revocation ruling. As this Court has explained, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary [and] capricious . . . . But if these pitfalls are avoided, change is not invalidating . . . ." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (internal quotations and citation omitted).

authority to issue advance rulings with respect to the prospective treatment of imported articles, such rulings are always subject to further review, revocation, or modification by Customs Headquarters. *See* 19 C.F.R. Part 177.[9]

Had petitioner desired greater certainty and reliability regarding the classification of its syrup, it could have requested a Customs Headquarters Rulings directly and with full disclosure. *See* 19 C.F.R. § 177.2(a), (b)(2)(ii)(B)-(C). But it chose not to do so. Instead, petitioner provided the local office with incomplete information, neglecting to include in its request facts and evidence that Customs Headquarters later described as "essential" to a proper classification of petitioner's import. App. 14a. As the local Customs officer who worked on the original advance classification letter later made clear, had petitioner provided complete information at the outset he would have referred petitioner's classification request to Customs Headquarters to determine whether the import was a sham. *See* C.A. App. 235, 298-99. Petitioner should not now be heard to complain about the revocation ruling in this case simply because it reversed a summary advance classification ruling that had been issued

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[9] Section 177.9(a) of 19 C.F.R. limits the legal effect of an advance ruling letter "to the particular transaction or issue described therein" and provides that it is binding only "until modified or revoked." Section 177.9(b)(1) explains that "[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect." Section 177.9(d)(1) makes clear that "[a]ny ruling letter found to be in error or not in accordance with the current views of the Customs Service may be modified or revoked." Finally, Section 177.8(b) provides that Customs' "Headquarters Office may from time to time issue . . . rulings with respect to issues or transactions described . . . by requests" for advance rulings, and that such Headquarters' "rulings . . . are statements of the official position of the Customs Service."

on the basis of incomplete information, and that was always subject under the law to revocation or modification.[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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[10] As Judge Friedman stated in his concurrence below, while petitioner may have built its business in reliance on the advance ruling, it "did not disclose to Customs the true and precise nature of the practice it proposed to follow with regard to the import[] . . . . If [petitioner] had fully informed Customs of how it intended to deal with the import[] . . . , we now know that Customs would not have ruled the import was subject to the lower duty." Pet. App. 21a.